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IN THE

Supreme Court of the United States

October Term, 1997

CLEAN (Citizens for Leaders with Ethics and Accountability Now!), a Washington non profit corporation, et al.,
Petitioners,

v.

CITY OF SPOKANE, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

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I. LIST OF PARTIES, PARENT CORPORATIONS, AND NON-WHOLLY OWNED SUBSIDIARIES

Pursuant to Sup. Ct. R. 14.1 and 29.1, Respondent City of Spokane ("the City") is a political subdivision of the State of Washington. The Spokane Public Development Authority ("the SPDA") is a public corporation created by the City pursuant to RCW 35.21.730-.757. Neither the City nor the SPDA have any parent companies or non-wholly owned subsidiaries.

II. OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents City and SPDA oppose the Petition for Writ of Certiorari to review the judgment of the Washington Supreme Court filed by CLEAN, et al.

III. STATEMENT OF THE CASE

This case stems from the City's decision to participate in the renovation and construction of a public parking garage.

After considerable study and public hearings, the City Council endorsed a proposal whereby the developers[1] would

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[1] The developers are Citizens Realty Company and Lincoln Investment Company of Spokane, Washington corporations and Respondents in the pending case.

privately borrow money to renovate and expand the public parking garage that is connected to a retail development and pedestrian mall being constructed on a vacated right-of way. Following this construction, the developers will sell the public parking garage to the Spokane Downtown Foundation ("the Foundation"), a non-profit corporation organized to promote development and other civic activities in downtown Spokane. The Foundation will then lease the public parking garage to the Respondent SPDA. Pursuant to Ordinance C-31823, the City Council agreed, inter alia, to accept unencumbered title to the public parking garage once the bonds issued by the Foundation are retired or defeased.

Section 14 of Ordinance C-31823 set forth facts supporting the need for the legislation to become effective immediately. The City Council's decision to make the Ordinance effective immediately was based on reports and studies provided to, and analyzed by, the City and testimony received during a public hearing. Spokane City Charter, Section 19, provides that an ordinance shall take effect immediately upon passage if it is "for the immediate preservation of public peace, health or safety or the immediate support of City government and its existing public institutions; provided it has in its preamble or body a statement of the facts giving rise to the necessity for immediate effectiveness, and it is

passed by a vote of one more than a majority of the council: . . ."

Section 83 of the Spokane City Charter provides for referendum of City ordinances passed by the City Council "if, prior to the date when any ordinance shall take effect, a petition signed by the qualified electors in number at least equal to ten percent of the total number of votes cast at the last preceding general municipal election, shall be filed with the clerk, protesting against the enactment of such ordinance. . . ."

The effect of these two sections is that any ordinance effective immediately is not subject to referendum.

The Petitioners challenged the adoption of Ordinance C-31823 on numerous state law grounds. Following an adverse decision by the Washington Supreme Court, the Petitioners raised, for the first time, the First Amendment issue presented here in a motion for reconsideration. The Washington Supreme Court denied the motion for reconsideration.

IV. SUMMARY OF ARGUMENT DENYING THE PETITION

Certiorari should be denied for three reasons. First the Petitioners did not raise their claim that Ordinance C-31823 violated the First Amendment of the United States

Constitution until Petitioners filed their motion for reconsideration of the Washington Supreme Court's decision upholding the Ordinance. Thus, their claim is untimely.

Second, the power of referendum is a state-created right. The Washington State Constitution does not grant a right of referendum to the people of local jurisdictions, except as authorized by the legislature. State law specifically conferred upon the City Council the power to pass Ordinance C-31823. Therefore, it was not subject to referendum. Furthermore, the people of Spokane, when they reserved the right of referendum in their City Charter, provided exceptions for exercising the power. One of the exceptions was to authorize the adoption of ordinances effective immediately. The City Council acted within the scope of authority granted it by the general laws of the State of Washington and by the people of the City of Spokane.

Third, assuming that the right of referendum involves core political speech, the Petitioners have conceded that the Washington State Constitution and Spokane City Charter protect the First Amendment right to free speech. The Petitioners in effect assert that the Washington Supreme Court misapplied the appropriate law to the facts when it concluded that Ordinance C-31823 was valid as enacted.

V. *REASONS FOR DENYING PETITION*

A. Petition for Writ of Certiorari Is Untimely.

It is untimely to raise a federal question in a motion for reconsideration to the Washington Supreme Court, except when the decision of that court unexpectedly gives rise to a federal question that the party seeking review has had no previous opportunity to assert, and could not fairly have anticipated. *See* cases cited in *Charles Alan Wright, Law of Federal Courts*, § 107, at 787 n.55 (5th ed. 1994). Petitioner's claim was not raised until after the Washington Supreme Court ruled on the merits of the numerous state claims submitted to it by CLEAN.[2] Indeed, a motion for reconsideration contemplates points of law or fact that were overlooked or misapprehended in the decision. RAP 12.4(c).

Here, the First Amendment implications of the court's refusal to review the facts underlying the City's invocation of the emergency clause should have been apparent as early as the trial court's opinion, which referenced preservation of the

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[2] While constitutional issues may be raised for the first time on appeal, the Washington Supreme Court has admonished parties that "'naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.'" *In re Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986) (quoting *United States v. Phillips*, 433 F.2d 1364, 1366 (8th Cir. 1970)).

people's right to referendum, as well as the court's reliance on *CLEAN v. State of Washington*, 130 Wn.2d 782, 804, 928 P.2d 1054 (1996), a case which addressed the issue of referendum and invocation of an emergency clause under a state referendum procedure. (*See* Petition at 62a-65a.) Thus, Petitioners had ample opportunity to present the First Amendment claim in a timely fashion to the Washington Supreme Court for its analysis, but did not do so. Petitioners waited until after the Washington Supreme Court issued its decision, and then asked for reconsideration. The Washington Supreme Court did not address the issue, but summarily dismissed the motion. (Petition at 41a). Accordingly, certiorari should be denied.

B. The Power of Referendum Reserved to the People of Spokane in the Spokane City Charter Is Limited by the Constitution and Laws of the State of Washington.

Ordinance C-31823 was an exercise of the City's authority, pursuant to Chapters 35.71 and 35.86 RCW, and other laws of the State of Washington to acquire facilities for the operation of public parking.

Washington courts have consistently followed the principle that direct legislation by the people of a local

jurisdiction, acting through the power of initiative or referendum, may not interfere with the exercise of any power delegated by state law to the mayor and city council as the governing body of the city. The constitutional root of that judicial principle is Article XI, Section 10 of the Washington Constitution, which provides that cities may adopt charters for home rule "consistent with and subject to the Constitution and laws" of the State of Washington. In ruling on the validity of initiative and referendum measures, Washington courts recognize that, while the inhabitants of the municipality may enact legislation governing local affairs, they cannot enact legislation that conflicts with the public policy established by state law. *Citizens Against Mandatory Bussing v. Palmason*, 80 Wn.2d 445, 450, 495 P.2d 657 (1972). RCW 35.71.060, relied upon by the Mayor and City Council when Ordinance C-31823 was adopted, provides in pertinent part:

> "The corporate authority may finance the establishment of a mall, including, but not limited to, right of way improvements, traffic control devices, and off-street parking facilities in the vicinity of the mall, by one or more of the following methods or by a combination of any two or more of them: . . ."

(Emphasis added.) The plans and specifications on file with the City provided for the establishment of "off-street parking facilities in the vicinity of the mall" as contemplated by RCW

35.71.060. RCW 35.86.030 further authorizes cities to acquire property for "off-street parking as the legislative bodies thereof determine to be necessary by ordinance." The power to establish such off-street parking facilities has clearly been placed with the Mayor and City Council as the corporate or legislature authority of the City, and is therefore not subject to referendum. In *State ex rel. Guthrie v. Richland*, 80 Wn.2d 382, 384, 494 P.2d 990 (1972), the Washington Supreme Court held:

> "[W]here there is a conflict between a general law enacted by the legislature and a freehold charter provision, the general law is superior to and supersedes the charter provision; and where the general law grants authority to the legislative authority of a city, that authority may not be exercised by the city as a corporate entity, nor is the exercise of that authority by the legislative authority subject to repeal, amendment or modification by the people through the initiative or referendum procedure."

The rationale for this rule is that the effect of permitting direct action by the electorate would be to limit the power conferred by the state legislature, upon the Mayor and City Council, as the legislative authority of the City and, if the statute places authority in the "corporate authority" or the "legislative authority" then the power rests exclusively with the Mayor and City Council. *Dahl v. Braman*, 71 Wn.2d 720, 430

P.2d 951 (1967), and *Neils v. Seattle*, 185 Wash. 269, 53 P.2d 848 (1936).

The power of referendum is also limited by the exception contained in the Spokane City Charter. Ordinances that are effective immediately are not subject to referendum. Spokane City Charter, Sections 19 and 83. The Spokane City Council relied on Section 19(a)(1), which provides that an ordinance is effective immediately if

> ". . . necessary for the immediate preservation of the public peace, health or safety or for the immediate support of city government and its existing public institutions; provided it has in its preamble or body a statement of the facts giving rise to the necessity for immediate effectiveness and it is passed by a vote of one more than a majority of the council; . . . "

The Washington Supreme Court found Section 19(a)(1) was virtually identical to Article II, Section 1(b) of the Washington Constitution[3]. *CLEAN v. City of Spokane*, 133 Wn.2d at 471. Article II, § 1(b) has been found to contain "two separate and distinct exceptions to the right of referendum"; (i) support of

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[3] Article II, Section 1(b) of the Washington Constitution states:

> "The second power reserved by the people is the referendum, and it may be ordered on any act, bill, law, or any part thereof passed by the legislature, *except such laws as may be necessary for the immediate preservation of the public peace,*

government and its existing institutions, and (ii) emergent matters dealing with the public peace, health and safety. *Farris v. Munro*, 99 Wn.2d 326, 336, 662 P.2d 821 (1983) and *State ex rel. Helm v. Kramer*, 82 Wn.2d 307, 312, 510 P.2d 1110 (1973). The "support of government" exception "does not require either immediacy or an emergency." *Farris v. Munro*, 99 Wn.2d at 336-37.

Petitioners' reliance on *Meyer v. Grant*, 486 U.S. 414 (1988) is misplaced. *Meyer v. Grant* invalidated a state law that made it a felony to pay petition circulators, it did not encumber a state's power to limit matters that are subject to referendum.

In *Dobrovolny v. Moore*, 126 F.3d 1111 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 1188 (U.S. 1998), the Eighth Circuit Court reviewed the Nebraska initiative process that made it burdensome for initiative proponents to gather signatures. Dobrovolny asserted a First Amendment violation. The *Dobrovolny* court noted that appellants were primarily relying upon *Meyer v. Grant*, 486 U.S. 414 in making their First Amendment challenge. "Clearly, the right to a state initiative process is not a right guaranteed by the United States

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health or safety, support of the state government and its existing public institutions . . . " (Emphasis added.)

Constitution, but is a right created by state law." *Dobrovolny*, 126 F.3d at 1113. The *Dobrovolny* court concluded:

> "Clearly, appellants can claim no constitutionally-protected right to place issues before the Nebraska electorate; any opportunity to do so must be subject to compliance with state constitutional requirements. *See Montero v. Meyer*, 13 F.2d 1444, 1446-47 (10th Cir. 1994).

Id.

Similarly, the Petitioners in this case can claim no First Amendment right to overturn the limitation on exercising the power of referendum set forth in the Spokane City Charter because the people of Spokane have placed this limitation on the power of referendum when they authorized the City Council to enact immediate legislation.

In *Biddulph v. Mortham*, 89 F.3d 1491 (11th Cir. 1996), *rehearing denied en banc*, 99 F.3d 1157 (11th Cir.), *cert. denied*, 117 S. Ct. 1086 (U.S. 1997), the Eleventh Circuit Court reviewed the Florida initiative process when a group challenged the process claiming a violation of First and Fourteenth Amendment rights. The Eleventh Circuit Court first addressed the right to petition the government and noted that it was aware of

> "no case that has held that state initiative regulations implicate the "right to petition the government for redress of grievances." *Moreover, scholarship on*

> *the issue explains that state initiative processes do not involve the sort of petitioning that is guaranteed by the Petition Clause."*

(footnotes omitted) (emphasis added) *Id.* at 1497. The Court believed that Biddulph's constitutional claim was best construed as a freedom of speech violation with reliance placed primarily upon *Meyer v. Grant, Id.* Biddulph argued the initiative process was subject to strict scrutiny. *Id.* The *Biddulph* court rejected the challenge to Florida's initiative law and a strict (or "heightened") scrutiny standard holding the "right" to place a citizen initiative proposal on the ballot is a state-created right" and not a right guaranteed by the First Amendment. *Id.*, at 1497-98. The Eleventh Circuit Court concluded that in the absence of some showing that "the initiative process substantially restricts political discussion of the issue" *Meyer v. Grant* is inapplicable. *Id.*, at 1498.

Here, the Petitioners were never denied the opportunity to engage in classical "core political speech." There was no restriction on the Petitioners' circulation of petitions, the Petitioners were able to freely communicate with the public and they even presented their petitions to their elected leaders. The First Amendment does not guarantee Petitioners the right to have their proposal placed on the ballot because the people, in adopting the City Charter, authorized the City Council to

bypass the referendum process when it granted authority to pass immediate legislation. The right of referendum power is not found in or guaranteed by the First Amendment.

Therefore, it is not necessary for the Supreme Court to evaluate, interpret, or otherwise rule on the issue of whether or not the Washington Supreme Court's decision violated the First Amendment of the United States Constitution.

C. Misapplication of a Properly Stated Rule Does Not Warrant Certiorari.

Rule 10 of the Supreme Court rules states certiorari will be granted only for "compelling" reasons. Further, certiorari will rarely be granted for the "misapplication of a properly stated rule of law." Sup. Ct. R. 10(c). The Petitioners' claim involves the misapplication of a properly stated rule of law. The Petitioners contend certiorari should be granted because the decision in *CLEAN v. City of Spokane*, 133 Wn.2d 455, 947 P.2d 1169 (1997), creates a new judicial constitutional rule abridging the right of referendum reserved to

the people by the Washington State constitution[4] and the Spokane City Charter. For the limited purpose of this response, the right of referendum is considered to be "core political speech," the abridgment of which is subject to exacting scrutiny. See *Meyer v. Grant*, 486 U.S. at 420

CLEAN does not challenge the facial validity of Washington Constitution Article II, Section 1(b), or Section 83 of the Spokane City Charter, which creates the right of referendum for citizens of local jurisdictions. Indeed, in its petition for certiorari, CLEAN specifically notes, "the Washington Constitution and Spokane City Charter already incorporated this court's high standards for protection of core political speech." (Petition at 20.) CLEAN merely argues that the judicial decision, and the court's refusal to scrutinize the facts underlying the City's decision to append Section 14 to Ordinance C-31823,[5] eviscerates the right to referendum by the substitution of a much laxer, judicially created standard not described in either the Washington Constitution or Section 83 of the Spokane City Charter.

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[4] The power reserved to the people of the state is not implicated in this case. *See* discussion, text at 9-10.

[5] The state court noted those facts underlying Section 14 of Ordinance C-31823 will not be reviewed unless they are "obviously false and a palpable attempt at dissimulation," (Petition at 17(a)).

The Petitioners' claim fails to present a sufficiently compelling justification for warranting Supreme Court review. The claim involves no important question of federal law (there is no federal right of initiative or referendum), no conflict among the law of the circuits of other states, and no conflict with the decisions of the Supreme Court.

Supreme Court Rule 10 permits review of problems that are beyond the academic or episodic, and only when the principles involved are important to the public as distinguished from the parties. *2 Federal Procedures Lawyer Edition* § 3:214 (1994). Here, the refusal by the Washington courts to question the City's use of the emergency clause is based on long-standing state precedent. *See State ex rel. Humiston v. Meyers*, 61 Wn.2d 772, 777, 380 P.2d 735 (1963); *State ex rel. Pennock v. Coe*, 42 Wn.2d 569, 573, 257 P.2d 190 (1953); *State ex rel. Pennock v. Reeves*, 27 Wn.2d 739, 743, 179 P.2d 961 (1947), *overruled on other grounds by State ex rel. Pennock v. Coe*, 42 Wn.2d 569, 257 P.2d 190 (1953); *State ex rel. McLeod v. Reeves*, 22 Wn.2d 672, 674, 157 P.2d 718 (1945). The Washington Supreme Court decision does not involve the facial validity of a constitutional right to referendum. Rather, Petitioners challenge the application of the rule in these particular circumstances. The judicial opinion represents a state court's decision regarding questions of state

law. *Charles Alan Wright, Federal Courts*, § 107 at 789 n.65 (5th ed. 1994)

VI. CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.